Quo Vadis?

Quo vadis?

In 2005 I concluded a study of the intellectual relationship between Lord President Cooper and T B Smith on this relatively optimistic note:[1]

> A final thought is that, with Scots law restated in the *Stair Memorial Encyclopaedia*, five Scottish law schools of international excellence in research,[2] maturing links between these schools and their South African, Louisianaian and other mixed jurisdiction counterparts,[3] the United Kingdom in the European Union, a Scottish Parliament, an active and diverse European private law movement in which Scots lawyers play a full part,[4] and the domestication of human rights in the United Kingdom, there now exist many of the conditions in which Cooper (to some extent) and, much more, Smith thought that their vision of Scots law would finally be realised.

Eight years later, however, I gave a public lecture suggesting that Scots law is in crisis.[5] This was not meant to contradict directly what I had said in 2005. Rather, the argument was that crisis is in some respects an inevitable feature of a small legal system because it cannot be self-contained. The crisis existed before devolution in 1999 (indeed the "Cooper-Smith ideology"[6] was a response to its existence); it had if anything intensified since; and it would not be solved by the Scottish people voting for independence in the referendum that was due to be held in September 2014. Having particular regard to the debate also raging at the time about the possible abolition of the requirement of corroboration following the *Cadder* case in 2010,[7] I drew an analogy between the vociferous defenders of the legal status quo and the Black Knight in the film *Monty Python and the Holy Grail*. He guards a very small bridge against all comers, and goes on trying to do so as an assailant gradually cuts off all his limbs with a sword. The Black Knights of Scots law, I suggested, think in this way, not only about English law, but also about human rights law, the Scottish Government, the Scottish Parliament, and the United Kingdom Supreme Court when

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1 Hector L MacQueen, "Two Toms and an Ideology for Scots Law: T B Smith and Lord Cooper of Culross", in Elspeth Reid and David L Carey Miller (eds), *A Mixed Legal System in Transition: T B Smith and the Progress of Scots Law* (Edinburgh: Edinburgh University Press, 2005), p 72 (footnotes as in quotation).

2 As determined by the university funding councils' Research Assessment Exercise of 2001.

3 Exemplified by, e.g., K G C Reid and R Zimmermann (eds), *A History of Private Law in Scotland* (Oxford: Oxford University Press, 2000); V V Palmer, *Mixed Legal Systems Worldwide: The Third Legal Family* (Cambridge: Cambridge University Press, 2001); the proceedings of the first World Congress of Mixed Jurisdictions, published in (2003) 78 *Tulane Law Review*; the formation of the World Society of Mixed Jurisdiction Jurists at the congress; and R Zimmermann, D Visser and K Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (Oxford: Oxford University Press, 2004). [Note that Palmer, *Mixed Legal Systems*, has appeared in a second edition: Cambridge: Cambridge University Press, 2012.]

4 See e.g. my contribution to H L MacQueen, A Vaquer Aloy and S Espiau Espiau (eds), *Regional Private Law and Codification in Europe* (Cambridge: Cambridge University Press, 2003), at pp 102-117.

5 Published as "Invincible or Just a Flesh Wound? (The 4th Willi Steiner Memorial Lecture)" (2014) 14 *Legal Information Management* 2.

6 The coinage of the late Ian Willock in a famous article: "The Scottish Legal Heritage Revisited", in J. P. Grant (ed.), *Independence and Devolution: The Legal Implications for Scotland* (Edinburgh; W Green & Son, 1976).

7 *Cadder v Her Majesty's Advocate* 2011 S.C. (U.K.S.C.) 13.

that body is ruling on the closely inter-twined matters of human rights and devolved competence and powers.

Four more years have passed. For this contribution, I have re-visited and edited the text of my 2013 lecture, having now also in mind the United Kingdom's impending departure from the European Union (Brexit) and the uncertain future of human rights law if the Prime Minister achieves her stated ambition of repealing the Human Rights Act 1998. The resultant renewal of the push for Scotland to become an independent state which would most probably seek to join the European Union and re-domesticate the European Convention on Human Rights is also a reason for me to return to what I said in 2013. But I have not found much I want to change.

Crisis? What crisis?

On what basis might it be said that a legal system which has operated for around a thousand years is in crisis? After all, its existence is guaranteed by no less than two of the 25 articles of the 1707 Union between Scotland and England & Wales,[8] while there is no suggestion in the relevant Treaties that the "ever-closer union" envisaged for Europe entails the removal of the domestic legal systems within Member States. Moreover, what might have been thought the most obvious gap in a legal system in Scotland, the absence of a legislature dedicated exclusively to its maintenance and development, has been substantially (if not fully) filled in as a result of devolution. In all other relevant respects, the system continues to function as it has done for centuries: an autonomous court structure and legal profession, a distinct structure of education, training and qualification in law, and a legal literature the vigour of which has been restored after a largely fallow period between the two world wars.

The starting point might however be said to be that guarantee of 1707. It is not always realised that discussions of, and, indeed, negotiation towards, voluntary Anglo-Scottish Union took place on numerous occasions from the late twelfth century on.[9] In such negotiations prior to the ones that led to the 1707 Union, however, the Scots always maintained the separate-ness of their law and legal system even after such a unification. In the 1707 Union, however, the Scots abandoned this traditional negotiating position. By Article XVIII of the Union Agreement "public right" is henceforth malleable to make it the same throughout the new United Kingdom. "Private rights" can also be changed but only where that is for the "evident utility of the subjects within Scotland", i.e. not necessarily to make it the same throughout the United Kingdom.[10] There were vital contrasts here: change to Scots law *was* envisaged, albeit with public law more susceptible to alteration than private law. Further, while the courts of both Scotland and England were expressly to retain their separate jurisdictions under Article XIX, nothing was said (probably deliberately) to

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[8] Articles XVIII and XIX.

[9] See J D Ford, "Four Models of Union" [2011] Juridical Review 45 (republished with an appendix of documents in *Miscellany VII* (Edinburgh: Stair Society vol 62, 2015); Hector L MacQueen, "*Regiam Majestatem*, Scots Law and National Identity" (1995) 74 *Scottish Historical Review* 1.

[10] The Union Agreement is here used as a verbal formula to embrace the Treaty of Union and the Acts of Union by which each Parliament involved gave effect to the Treaty. See generally J. D. Ford, "The Legal Provisions in the Acts of Union" (2007) 66 *Cambridge LJ* 106; John W. Cairns, "The Origins of the Edinburgh Law School: the Union of 1707 and the Regius Chair" (2007) 11 *Edin LR* 300.

prevent appeals from the Scottish courts to the House of Lords; and these quickly became established practice in civil cases.[11]

These provisions for change to Scots law by the legislature sowed the seeds from which grew much legal development that was not so much actively hostile to the Scottish legal system as simply by-passed it.[12] From the nineteenth century on legislation sought to deal with pressing social issues to which traditional legal analysis of any kind, Scottish or English, seemed quite irrelevant if not inimical – notably social and welfare law, but also the taxation providing the resources with which to tackle these problems. The rise of the welfare state in the twentieth century was the rise of a British state, not of distinct English and Scottish ones. Likewise the growth of commerce within the single market that now existed in the United Kingdom did not respect and was indeed rather impatient with jurisdictional divides. The Westminster Parliament responded with measures which, while sometimes recognising Scottish differences, tended to treat them as peculiarities rather than as affecting the fundamentals of unifying schemes.[13] Commerce also threw up new ideas – corporations, insurance, intellectual property, consumer protection – which seemed to require new law altogether; and there also seemed to be little point in spending time devising distinct legal responses that would accord with either English or Scottish legal traditions. But English law and lawyers tended to have the lead in taking such developing law forward, the inevitable result of a much larger population and economy south of the continuing jurisdictional border. Scottish freedom of manoeuvre thus tended to be pre-empted by decisions and practice in England.

The growth of the state entailed the growth of public law, which, it will be recalled, might under the Union Agreement be changed to make it the same throughout the United Kingdom. Public law could not be seen as wholly un-Scottish; for example, local government continued to be Scottish rather than brought into line with England or re-created along new British forms,[14] while the constitutional question of the relationship between church and state in Scotland would be a fundamental issue dividing Scottish society throughout the nineteenth and into the twentieth century.[15] The emergence of a Secretary for Scotland as a UK Government post in 1885 (to become a Secretary of State in 1926) was also important recognition that the governance of Scotland could not be completely subsumed within an overall United Kingdom structure. But other great matters of state by and large fell to be played out elsewhere than in Scotland or the Scottish courts. The big books on the subject were mostly written and published south of the border, and only rarely considered the Scottish dimension or indeed the Union of 1707 unless to dismiss it or minimise its significance. Dicey's characterisation of the Act of Union as merely

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[11] See most recently John Finlay, "Scots Lawyers and House of Lords Appeals in Eighteenth-century Britain" (2011) 32 *Journal of Legal History* 249; J D Ford, "Protestations to Parliament for Remeid of Law" (2009) 88 *Scottish Historical Review* 57.

[12] For an interesting analysis of the nineteenth-century Anglicisation of Scots law see Michael Fry, *A New Race of Men: Scotland 1815-1914* (Edinburgh: Birlinn, 2013), pp 126-136.

[13] The classic example is the Sale of Goods Act 1893.

[14] See Anne E Whetstone, *Scottish County Government in the Eighteenth and Nineteenth Centuries* (Edinburgh: John Donald, 1981).

[15] See Lord Rodger of Earlsferry, *The Courts, the Church and the Constitution: Aspects of the Disruption of 1843* (Edinburgh: Edinburgh University Press, 2008).

another statute which the Westminster Parliament could amend or repeal in the simple exercise of its own absolute sovereignty is the best-known example.[16]

The process of legal integration in social and commercial matters was reinforced by the processes of "Europeanisation" which followed the United Kingdom's accession to what is now the European Union on 1 January 1973. This affects English as much as Scots law, and it has given the historically aware Scots lawyer a certain *Schadenfreude* to hear cries of protest emanating from English lawyers against European Union proposals for changes to the law. Indeed, similar cries come from France and Germany. If Scotland is more muted, it may not be so much the product of its greater Europhilia as of longer experience of power to change the law being exercised elsewhere than within its own jurisdiction.

The domestication of the European Convention on Human Rights, partly through the Human Rights Act 1998 but more significantly through the Scotland Act 1998, to some extent brought the agency of change back to Scotland, inasmuch as the Scottish courts are given the power to determine the meaning of Convention rights for themselves and indeed, at least initially, embraced the opportunity with enthusiasm.[17] Some at least of the judges may also have relished the opportunity to keep the new Scottish Parliament and Government under control by means of their requirement to respect Convention rights.[18] Some of the enthusiasm faded, however, as it became clear, not only that criminal law and procedure, hitherto one of the main bastions of Scottish legal autonomy, was subject to review for consistency with Convention rights, but also that, for most purposes, the final say on these matters now lay, not in the High Court of Justiciary, but in either the European Court of Human Rights or (more worryingly), in Westminster, in the form of the House of Lords, the Judicial Committee of the Privy Council, or, after 1 October 2009, the new UK Supreme Court.

The culmination of this was the Supreme Court's decision in the *Cadder* case, handed down on 26 October 2010,[19] that the Scottish legislation which allowed the prosecution to rely on confessions made by a suspect without access to legal advice during police interviews was contrary to that individual's right to a fair trial under Article 6 of the ECHR as authoritatively defined by the European Court on Human Rights in *Salduz v Turkey*.[20] This not only over-ruled the High Court's view of the question, but also led instantly to a sweeping legislative reform of Scots criminal procedure in the form of the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010. Further, the judge Lord Carloway (now Lord

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[16] Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (1st edn, London: Macmillan, 1885; 10th edn, Basingstoke: Macmillan Education, 1959) ch. 1. See also Albert Venn Dicey and Robert S Rait, *Thoughts on the Union between England and Scotland* (London: Macmillan & Co Ltd, 1920). The Diceyan view of parliamentary supremacy may be seen as renewed by *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

[17] See *Starrs v Ruxton* 2000 J.C. 208.

[18] See e.g. *A v Scottish Ministers* 2001 S.C. 1, affirmed 2002 S.C. (P.C.) 63*; Whaley v Lord Watson of Invergowrie* 2000 S.C. 340; *Salvesen v Riddell* 2013 S.C. 69 (revd in part 2013 S.C. (U.K.S.C.) 236).

[19] *Cadder v Her Majesty's Advocate* 2011 S.C. (U.K.S.C.) 13.

[20] *Salduz v Turkey* (2008) 49 E.H.R.R. 421. The relevant Scottish legislation at the time of *Cadder* was ss 14 and 15 of the Criminal Procedure (Scotland) Act 1995 but in form it was introduced under the Criminal Justice (Scotland) Act 1980.

President and Lord Justice General) carried out a general review of Scottish criminal procedure with two main objectives in mind: compliance with the ECHR and ensuring a fair balance between the interests of prosecution and defence. One of his Lordship's central recommendations when he reported in November 2011 was the abolition of the distinctive evidential requirement of corroboration.[21] But such was the opposition to this inside and outside the Scottish Parliament that the relevant part of the implementing legislation was eventually dropped in April 2015.[22]

A terminal decline?

In *Monty Python and the Holy Grail*, the Black Knight dismisses the loss of his left arm as but a scratch, and goes on fighting. The autonomy of Scots law and the Scottish legal system is certainly less than it was; but the essentially external factors just discussed have simply forced upon the players within the system the need to change approach rather than give up the game altogether. Many of the same factors impact upon other legal systems in similar ways. Patched up, and with some rehabilitative treatment, the Scottish version can continue to perform in a useful way, even to the extent of using its limited but none the less still real autonomy to influence those wielding the power of final decision-making, whether legislative, executive or judicial. Things become progressively more difficult for the Black Knight, however, as one by one his limbs are severed; and however much he may dismiss each of his losses as just flesh wounds, the reality is that they eventually deprive him of any capacity to guard the bridge. Is there any reason to think that Scots law and the Scottish legal system are on their way to a parallel fate?

So far as the law itself is concerned, my concerns are perhaps primarily those of an academic whose main areas of interest outside the law's history lie in private and commercial law. While the internationalisation that has taken place in the Scottish law schools over the last twenty years is to be welcomed, one side-effect seems be an increasing lack of engagement with Scots private law on the part of academics and students. Researchers are discouraged from writing on the subject, and from publishing in Scottish academic and practitioner journals, on the basis that by definition such research cannot be of "international" or "world-class" quality as demanded by the Research Assessment Exercises of the recent past and now by their replacement, the Research Excellence Framework. While academic Scottish private lawyers have responded by engaging vigorously with comparative law and European private law, it cannot be said that there has been much reciprocal engagement with Scots private law by those joining Scotland's law schools from other jurisdictional backgrounds.[23]

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[21] See The Carloway Review: Report and Recommendations 2011, accessible at http://www.scotland.gov.uk/About/CarlowayReview.

[22] See BBC News website, 21 April 2015, http://www.bbc.co.uk/news/uk-scotland-scotland-politics-32398065. The abolition of corroboration had been provided for by Part 2 of Chapter 8 of the Criminal Justice Bill introduced in June 2013. The Bill went on to become the Criminal Justice (Scotland) Act 2016.

[23] Notable exceptions are Pierre de Gioia-Carabellese of Heriot-Watt University (see his articles, "Le Missives and Deposits in Scots Law: Diachronic and Comparative Reflections about the Concept of Arrha" *European Business Law Review*, forthcoming; (with C Chessa); "The Concepts of the Scottish (and Italian) Unilateral Promise and the English Unilateral Contracts (Comparative Law Reflections on "Call Options" and "Put Options" in the light of the Jurisdictions of England, Scotland and Italy)" 2011(3) *European Business Law Review* 381) and Andreas Rahmatian of Stirling, then Glasgow Universities (see his book *Lord Kames: Legal and Social Theorist* (Edinburgh: Edinburgh University

But the concerns are not simply academic. There are signs that even practitioners are averse to using or investigating the Scots law that is their *raison d'être*. In the world of commercial contracts, for example, it is common for Scottish practitioners to advise parties to make the governing law of the contract English rather than Scottish. This can be to avoid practical difficulties with Scots law, but even more vital is the attitude of the funders and the insurers without whose support and engagement commercial activity and development generally becomes difficult at best and impossible at worst. While Scotland once provided enough of a market place for banks and others to run independent and successful businesses there, survival in the conditions of the last couple of decades has required expansion far beyond the Scottish market;[24] and by and large this has led to abandonment of Scots law as the basis for commercial transactions and the adoption, at least within the United Kingdom, of English law instead. This is what funders and insurers know and expect to see in the projects they are supporting. If English law presents difficulties, established solutions are usually available, while the English courts generally have judges with enough commercial experience to provide robust solutions to new issues if they arise. This, rather than any perceived deficiency in Scots law as such, is the main reason for non-use of Scots law; English law is simply better known.

The flesh wounds from which I think Scots law is suffering at present in the commercial context can thus be summarised as a combination of impotence (the brute economic facts of a United Kingdom marketplace), inaccessibility (where is Scots law to be found?); ignorance (partly a concomitant of the inaccessibility); impatience (if an answer can be found in the much more abundant English sources, why take the time to see whether the Scottish sources tell a different story?); and, perhaps, indifference (why does or should it matter which law applies?). It is more than disconcerting that those with the power and knowledge to choose their law and legal system on the whole go elsewhere.[25] When all this is coupled with the academics' fear of being thought parochial or local in one's concerns if focusing at all on Scots law, the resultant mix is pretty toxic.

Reasons to be cheerful?

Cassandras have been proclaiming the imminent death of Scots law for at least the last hundred years. Yet the law and the legal system which sustains it continue to exist in internationally meaningful ways. The mixed system of Scots private law, combining the supposedly fundamentally different and incompatible elements of Civilian and Common Law thinking, attracts substantial interest in other jurisdictions: notably the other mixed systems such as South Africa and Louisiana, but also in Continental Europe where it serves as a possible exemplar for a future European

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Press, 2015) and his article "Codification of Private Law in Scotland: Observations by a Civil Lawyer" (2004) 8 Edin LR 31).

[24] See Ian Fraser, *Shredded: Inside RBS, the Bank that Broke Britain* (Edinburgh: Birlinn, 2014); Iain Martin, *Making It Happen: Fred Goodwin, RBS and the Men Who Blew Up the British Economy* (London: Simon & Schuster 2013); Ray Perman, *Hubris: How HBOS Wrecked the Best Bank in Britain* (Edinburgh: Birlinn, 2012).

[25] For further discussion of this phenomenon, see Lord Hodge, "Does Scotland Need Its Own Commercial Law?" (2015) 19 *Edin LR* 299; Jonathan Hardman, "Some Legal Determinants of External Finance in Scotland: A Response to Lord Hodge" (2017) 21 *Edin LR* 30.

private law.[26] Scottish practitioners play an active part in international legal associations; Scottish law firms have offices outside Scotland, reflecting the international nature of their businesses; and where thirty years ago it was exceptional for Scottish academic lawyers to travel internationally to talk about Scots law, today it is rare indeed to find a colleague who is not either recently returned from doing so or contemplating an imminent departure on such a mission or, perhaps, a period of research leave in a foreign law school.

Legislative devolution has done much to re-invigorate the legal system. For my own current institution, the Scottish Law Commission, the existence of the Scottish Parliament and past success with land law has encouraged ambitious projects for the comprehensive modernisation of other significant areas of law such as land registration, trusts, moveable securities, incapable adults and, of course, contract. The realistic prospect of legislation also encourages the active participation of stakeholders in the Commission's efforts to gain understanding of present practice and problems as well as to produce principled yet realistic solutions. The Land Registration etc (Scotland) Act 2012 is a recent example of what can be achieved by reform processes of this kind.[27]

The integrative political process described earlier in this piece will soon be put into a form of reverse by Brexit; and that may accelerate if, as some certainly wish, that leads on to Scotland's departure from the United Kingdom. Depending on one's point of view, these things may or may not be reasons to be cheerful in general; but if fully realised, they certainly entail an autonomous legal system for Scotland. On the other hand, although an already distinct law and legal system has long been one of the primary reasons for supposing that Scotland could indeed function as an independent state once more, the subject was not addressed until the seventh of the ten chapters altogether in the White Paper produced by the Scottish Government in November 2013 during the run-up to the Independence Referendum held the following year.[28] That document told us that an independent Scotland would be a member state of the European Union (renewing a key force for integration in law) and the Council of Europe (meaning amongst other things that the new written constitution also promised would probably bear a close family resemblance to the European Convention on Human Rights). But this seems to be what the majority of Scottish people would in general prefer. It would not lead to the death of the legal system.

Taking Scots law seriously

The title of this piece comes from the apocryphal Acts of Peter, where the future saint, fleeing Rome in fear of his life, has a vision of Christ walking in the opposite

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[26] See e.g. the works cited above at notes 3 and 4; Hector MacQueen and Reinhard Zimmermann (eds), *European Contract Law: Scots and South African Perspectives* (Edinburgh: Edinburgh University Press, 2006); Laura Vagni, *La Promessa in Scozia* (Milan: Giuffre, 2008); Vernon Valentine Palmer and Elspeth Reid (eds), *Mixed Jurisdictions Compared: Private Law in Louisiana and Scotland* (Edinburgh: Edinburgh University Press, 2009); Elspeth Reid and Daniel Visser (eds), *Private Law and Human Rights: Bringing Rights Home in Scotland and South Africa* (Edinburgh: Edinburgh University Press, 2013).

[27] See Scottish Law Commission, Report on Land Registration (Scot. Law Com. No. 222, 2010).

[28] See Scottish Government, Scotland's Future: Your Guide to an Independent Scotland (accessible at http://www.scotland.gov.uk/Publications/2013/11/9348/0).

direction and asks him where he is going. The answer is: "I go into Rome to be crucified." Peter turns back to the city and his own eventual martyrdom.[29] For the reasons already given, we need not, however, fear that Scots law will share the fate of St Peter – or indeed that of the Black Knight. But whatever happens on the political and constitutional front, it behoves the participants in the system – the people who live under it as well as legislators, judges, lawyers and law reformers - to make it and the law it operates as good as it can be, matching and where feasible surpassing international standards of excellence and justice. If the outcomes attract others to make use of it in some way, that will be all to the good; but the primary aim must be the best possible service to the people who live and work in Scotland.

In thinking about what this might entail, I often find myself reflecting on the wise words of those who have gone before. I agree with Lord Cooper that the first concern should be with "the matters which inevitably touch the lives of all citizens from the cradle to the grave", (i.e. not the criminal law or the control of government), but rather "the body of principles and doctrines which determine personal status and relations, which regulate the acquisition and enjoyment of property and its transfer between the living or its transmission from the dead, which define contractual and other obligations, and which provide for the enforcement of rights and the remedying of wrongs" (i.e. private law).[30] In this perspective, since everybody dies, the law of succession is much more important than, for instance, the law of corroboration, which affects only those who investigate and prosecute crime, those accused of crime, and the victims of crime – important groups each, but even all together still a small minority of the population.

Again, take Viscount Stair, writing towards the end of the seventeenth century:

> No man can be a knowing lawyer in any nation, who hath not well pondered and digested in his mind the common law of the world, from whence the interpretation, extensions and limitations of all statutes and customs must be brought.[31]

By the "common law of the world" Stair meant "material justice ... orderly deduced from self-evident principles, through all the several private rights thence arising, and ... the expedients of the most polite nations, for ascertaining and expeding the rights and interests of mankind".[32] In other words, he thought that good law was produced by a mixture of internal reflection on justice between persons and external comparison with the answers provided in other legal systems. For Stair, England was one but by no means the only possible comparator.

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[29] *The Acts of Peter*, ch. XXXV (accessible online in M. R. James' translation at http://www.earlychristianwritings.com/text/actspeter.html). *Quo Vadis: A Narrative of the Time of Nero* is the title of a novel published in 1895 by Henryk Sienkiewicz, who won the Nobel Prize for Literature in 1905. The book has been made into a film several times, the most famous one being produced in 1951 starring Robert Taylor and Deborah Kerr.

[30] Lord Cooper of Culross, *Selected Papers 1922-1954* (Edinburgh and London: Oliver & Boyd, 1957), p 174.

[31] James Dalrymple Viscount Stair, *Institutions of the Law of Scotland* (2nd edn 1693, reprinted Edinburgh University Press 1981), I, 1, proemium.

[32] Stair, *Institutions*, Dedication to the King.

In the mid-twentieth century, J J Gow, who learned his law and taught it in Aberdeen as well as practising and teaching it in Australia and Canada, said somewhat similar things to Stair in criticism of the approach of his legal contemporaries in Scotland:

> In this exceedingly complex society of ours what the lawyer dare not be without is a knowledge of the economic, political and social facts of his civilisation. He needs this knowledge not as a dilettante, not even as a matter of personal cultivation, important though that may be, but as a matter of professional competence. ... Our society is changing faster than I write. In so far as it has or will have room for a legal profession, it is and will be for a profession which is not excessively concerned with the pathological processes of the law conducted in a manner which often exhales the odour of antiquity, but which is prepared to go out into the social field, ascertain the facts of life, gauge the needs and aspirations and seek to furnish efficient answers through the courts and otherwise. ... Society does not owe us a living and certainly not on the excuse that because a nineteenth- or earlier-twentieth-century judge said otherwise we are powerless to act. Nor is the timidity and evasiveness of politicians a pretext for doing nothing.[33]

One specific lesson from all these observations is the need, not just to reform the law, but also to think hard about the need for doing it by way of legislation or even codification. The difficulty of saying what Scots law is in many areas of current concern has borne itself in upon me repeatedly in writing national notes for Scotland for European private law publications and, even more urgently, in making contributions to joint projects with the Law Commission of England & Wales. Far too often one is left making extrapolations from nineteenth-century or earlier cases, or drawing upon isolated (and not infrequently unreported) single judge decisions of more recent provenance. If the relatively time-rich professor or Law Commissioner finds such exercises problematic, what of the hard-pressed practitioner advising clients? The difficulties can be exacerbated by the writers of legal textbooks and treatises taking widely divergent views of such authorities as exist in the sources.

A code – or quasi-codifying statutes in particular areas – would at least have the merit of stating authoritatively what the law is, for good or ill.[34] And if it turned out to be ill, it could then be reformed with better understanding of what the problems for solution are. That approach is not readily available in a Common law system. Codifications are not, of course, short-term projects. Unless we were simply to adopt some already codified system, substantial human and other resources over a long period of time would be required. If the authors of the 2013 Independence White Paper ever thought about a great project of reforming statutory restatement or codification of the law to follow and mark independence, they clearly discarded the idea. But new and re-codifications are taking place all over the world at the moment; where the will and the need exist, the means can be found. Until these things come

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[33] J J Gow, *The Mercantile and Industrial Law of Scotland* (Edinburgh: W Green & Son, 1964), pp vi, ix.

[34] For recent discussions of codification see Martin A. Hogg, "Codification of Private Law: Scots Law at the Crossroads of Common and Civil Law", in Kit Barker and others (eds), *Private Law in the 21st Century* (Oxford: Hart Publishing, 2017) ch. 6; Kenneth Reid, "Smoothing the Rugged Parts of the Passage: Scots Law and Its Edinburgh Chair" (2014) 18 *Edin LR* 315.

together, however, and indeed ahead of these things coming together, we must do more in the reform of the courts to attract and retain business, not drive it away, and so improve the chances of developing our common law. Judges, court administrators, and court practitioners need to face outwards and forwards, as well as dealing with the specifics of the case before them in the time-honoured ways.

All of this applies whether or not Scotland becomes an independent country as a result of a second independence referendum following (or indeed preceding) Brexit. Many of the problems I have described are those of any small legal system in the modern world and its globalised economy. They will not loom any less large because the system is that of a small independent state. Lawyers practising and academic must consider what is needed, and what is wanted, from their small legal system and its law, especially its civil law. In the areas covered by the headings of "Private Law" and, indeed, "Criminal Law", we must think in particular whether we can really manage to operate consistently with the rule of law and human rights as a Common law system reliant on judicial decisions for much of its substance. Too much of our common law is uncertain; and where it is known, it is often too inflexible and so difficult to apply in modern social conditions. We have not been bold enough in thinking about what modernisation requires, or in trying to use our traditional sources in less traditional ways – for example, in thinking what specific statutory changes might imply for neighbouring parts of judge-made law.[35]

If we take Scots law seriously, and want it to have a good and useful future rather than merely go on existing because it does, we need to stop being Black Knights, remind ourselves again and again of what Stair and Gow said in the passages quoted above, look around us, and act in their spirit – not to defend the status quo or to seek a restoration of the status quo ante, but rather to respond as well as we can to the economic, political and social facts of our civilisation and make our law fit for consideration as part of the common law of the world.

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[35] I attempted to use this approach in Hector MacQueen, "A hitchhiker's guide to personality rights in Scots law, mainly with regard to privacy" in Niall R. Whitty and Reinhard Zimmermann (eds) *Rights of Personality in Scots Law: A Comparative Perspective* (Dundee: Dundee University Press, 2009), p 549, 565-587.

[*] I am grateful to Andrew Steven for helpful comments on a previous draft of this contribution.